

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-1205

NO. 77-1250

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
Pg S

MARK FREDERICK BUTHORN,
Appellant

V.

UNITED STATES OF AMERICA
Appellee

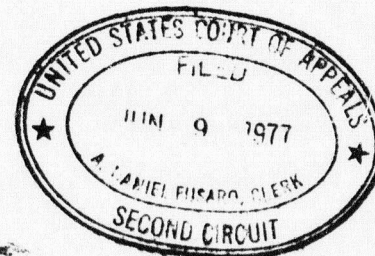
On Appeal From The
Southern District of New York

APPELLANT'S BRIEF

and appendix

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MARK FREDERICK BUTHORN

Appellant

V.

DOCKET NO. 77-1205

UNITED STATES OF AMERICA

Appellee

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1291.

STATEMENT OF FACTS

The Appellant was convicted on 21 counts of violating Title 18, U.S.C. § 1001 and 2. His previous trial ended in a hung jury and mistrial on July 17, 1976. The trial was conducted in the Southern District of New York, Judge Charles L. Brieant presiding. The Appellant was sentenced to serve four years in jail on March 16, 1977.

During the period of April, 1971 through August, 1972, Dr. Mark F. Buthorn, Jr., then a 30 year old podiatrist, practiced in a health clinic located in the Bronx, New York City. In the course of his treatment of many patients, Dr. Buthorn filled out and submitted to the New York City Department of Social Services their payment forms entitled "Invoices for Doctor's Services." The forms contained no reference to any governmental agency other than the New York City Department of Social Services. Payments,

by check, were from the same agency directly to Dr. Buthorn. Acceptance or disallowance of the claims were determined solely by the city agency.

The essential allegation against Appellant was that the invoices he submitted for services rendered under the Medicaid program were false. The government produced several witnesses who testified that the Appellant, a foot doctor, had not administered some of the treatment for which invoices were submitted.

The trial became a question of credibility inasmuch as the Appellant testified that all such services claimed were in fact rendered.

The critical period of time involved is the period Appellant worked at the medical clinic known as H.I.N. or Centro Medico.

SUMMARY OF THE ARGUMENTS

- A. The Appellant did not receive a fair trial.
 1. Judge Breiant belittled, badgered and hurried defense counsel throughout the proceedings, making it especially difficult to conduct thoughtful cross-examination and thus, violating the defendant's right to a fair trial, due process of law and effective assistance of counsel.
 2. The trial judge also allowed evidence that the Appellant paid Medicare \$8,000.00 in settlement

of a civil matter. The issues were confused and the jury inflamed by this highly prejudicial testimony.

- B. The indictment should be set aside and the conviction reversed because the transcript of the Grand Jury proceedings did not reveal any instruction regarding the right of members to call witnesses rather than rely on hearsay. Moreover, it is not clear the proper instruction was administered off the record as claimed by the Government.
- C. The conviction should be set aside because there was no evidence that Appellant knew his claims and invoices were being paid by the federal government. Therefore, only the State of New York had a cause of action against the Appellant.

Argument I

THE TRIAL COURT ERRED IN REPEATEDLY HURRYING,
BELITTling AND BADGERING DEFENSE COUNSEL,
THEREBY DEPRIVING THE APPELLANT OF A FAIR
AND IMPARTIAL TRIAL AND DUE PROCESS OF LAW.

During the course of this trial the District Judge repeatedly hurried, belittled and badgered defense counsel, both in the presence of the jury and at the bar.^{1/} Judge Brieant's impatience and intemperance created an atmosphere that denied Appellant a fair trial and due process of law and the conviction must be reversed. United States v. Coke, 339 F2d 183, 185 (2d Cir. 1964), Young v. United States, 346 F2d 793 (D. C. Cir. 1965), Sunderland v. United States, 19 F2d 202 (8th Cir. 1927).

The cross-examination of every important government witness was punctuated by severe instructions to defense counsel by the judge that hurried and demeaned him and abbreviated his questioning. During the cross-examination of the Government's lead witness (where critical first impressions are created) defense counsel attempted to establish that Medicaid claims were often fraudulent -- obviously because Medicaid recipients were to testify against the Appellant. The court mildly rebuked defense counsel at

^{1/} Comments by the court in the presence of the jury will be denoted in transcript references by "j".

first, indicating that such fraud was common knowledge (Tr. 43, j). However, after allowing counsel to cross-examine further he abruptly cut him off, saying, "We don't have to go any further than that. Everybody knows this takes place. Let's go on to this trial. Let's talk about this case." (Tr. 43-44, j).

Immediately thereafter counsel attempted to lay a predicate to introduce a certain letter, which caused the judge to snap, "If you have a letter mark it for identification. Offer it in evidence. I can't waste time with this folderol that has nothing to do with the case." (emphasis added) (Tr. 45, j). Ironically the letter -- the irrelevant "folderol" -- and an additional document were then admitted into evidence, over the objection of the prosecutor (Tr. 46). Defense counsel then attempted to question the witness from the letter:

Q Was the New York City Department of Social Services required or requested to provide information as to medical treatment for various Medicaid patients and particularly in response to Government's Exhibits 1 through 28, the persons listed there?

A Yes.

Q Was the response of the City of New York that they could not do so? (Tr. 46).

The court immediately escalated his attack:

THE COURT: Is that what the letter says?
Isn't it?

MR. GRUNEWALD: Yes, sir.

THE COURT: That has been covered. You did not have to do it twice. You can read the letter to the jury at the proper time. Do not waste time. Cross examine this witness and send him home.

MR. GRUNEWALD: I will get to the question. I want to be as quick as possible.

THE COURT: All right, let's go. The letter is in evidence. (Tr. 46-47).

The trial judge seemingly could not issue gentle reproach; rather he continued his intemperate remarks, sometimes after objections, sometimes sua sponte. Defense counsel continued his questioning:

Q On a prior occasion, Mr. Sternberg, did I request that you try to locate certain prescriptions in connection with Dr. Buthorn, do you recall?

A Yes.

Q And these were prescriptions that were submitted in connection with services rendered?

MR. WILSON: Objection to this form of question. Counsel is testifying.

THE COURT: Yes, I will sustain the objection to the form.

Q Did I ask that you try to locate prescriptions?

A Yes.

THE COURT: Never mind what you asked. The question is does he have any prescriptions or doesn't he? That is the question. If you want him to produce prescriptions ask him if he has any. He can tell you whether he has them or not. (Tr. 54).

During the cross-examination of another witness, one Comacho, Judge Briant interrupted (Tr. 181-185) to attack the intelligence and competence of defense counsel:

THE COURT: Why is it we are having these tremendous pauses? Why is it we are having every answer repeated? Not just the good answers. I don't mind tactics. If a lawyer wants to take a good answer and repeat it so as to make sure the witness' answer is heard by the jury, that is commonplace, but you must not do it with every single answer. You are getting a tremendous time lag between answers. You are not paying attention to my directions and rulings, and you are being repetitious, and you've tried this case once so it ought to be very easy; it ought to be like rolling off a log. (Tr. 182).

He concluded his remarks by saying

Please let's not have this lengthy delay. If you want to show the jury that her recollection is poor, the way to confront her is to frame your questions one after another, and you sit there thinking and having -- or having a private seance with yourself wasting my time on a case you tried once. You ought to be ready. It's ridiculous. (Tr. 184).

After limiting cross-examination of Comacho (Tr. 189) and denigrating counsel's competence (Tr. 192), Judge Briant indicated counsel was insulting the jury's intelligence and wasting their time (Tr. 198, j). While examining another government witness the judge told defense counsel, "Look, I'm not going to have speeches to the witness. I've told you that several times. She is not concerned with what you want, and you are not to tell her what you want. Just try the case." (Tr. 293).

The record is replete with the trial judge's ascerbic, contradictory and unwarranted remarks^{2/} made primarily before the jury. Appellate courts have consistently deplored such intemperate conduct, recognizing a litany of resultant dangers, such as unnerving defense counsel, prejudicing the jury and contaminating the impartial atmosphere of the trial. Clearly Judge Briant's conduct was inconsistent with the well settled principle that the District Judge's fundamental duty is to ensure that "...the entire trial will be conducted in a general atmosphere of impartiality." United States v. Cassiagnol, 420 F2d 868, 878 (4th Cir. 1970). See also United States v. Cole, 491 F2d 1276 (4th Cir. 1974); Young v. United States, 346 F2d 793 (D. C. Cir. 1965); United States v. Coke, 339 F2d 183, 185 (2d Cir. 1964); United States v. Kelly, 314 F2d 461 (6th Cir. 1963). The conviction should be reversed.

^{2/} These references include, but are not limited to, Tr. 116-118; 345-6; 358-9; 362, j; 364, j; 365, j; 370-1, j; 404, j; 445, j; 448-451, j; 452, j; 454, j; 455-6, j; 473, j; 494-7, j; 449, j; 559, j; 562, j; 578-9, j.

Argument II

THE TRIAL COURT ERRED BY ALLOWING IMPEACHMENT
OF THE APPELLANT WITH EVIDENCE OF A CIVIL
SETTLEMENT OF A MEDICARE CLAIM AGAINST HIM,
WHICH SERVED ONLY TO PREJUDICE AND CONFUSE
THE JURY

Appellant testified that he had thrown away certain records in 1975 related to the treatment of his patients in 1971 at the medical clinic in question. (Tr. 863).

It was later developed these records were thrown away at a time when Appellant was not under investigation (Tr. 936). The prosecutor attempted to cross-examine on the Appellant's ability to properly document his treatment: "Dr. Buthorn, it is a fact, is it not, that you had some difficulties in documenting some of your treatment on some of your other Medicare patients? Is that correct?" (Tr. 863).

Appellant answered "No" (Tr. 863) but the Court apparently agreed the question was irrelevant (Tr. 864). The prosecutor's justification for the question was that he would:

. . . like to develop the line that he [Appellant] had a great deal of trouble in the summer of '72 and into '73 with Medicare in documenting certain treatments he had claimed for, and that trouble resulted in him paying back Medicare eight thousand dollars.

^{not}
We are suggesting that this dispute was any criminal activity on the part of

Dr. Buthorn. Medicare had a difference of opinion with Dr. Buthorn concerning whether or not the treatments he was giving were treatments covered by Medicare." (Tr. 864-5).

The judge's response was correct:

THE COURT: Why wouldn't it be criminal? You see the difficulty --" (Tr. 865).

The prosecutor persisted:

MR. WILSON: I will give him [Appellant] the benefit of the doubt.

Let me explain, your Honor. He had a great deal of trouble with Medicare to the extent of paying back eight thousand dollars. Now after being burned for eight thousand dollars in 1973, destroying records in 1975 would be the last thing a reasonable man would do, and this goes directly to his credibility. (emphasis added)

THE COURT: The difficulty with it is that it implies to the jury that he committed a prior crime which was similar to this one, and I don't know how you can --

MR. WILSON: To ask a witness --

THE COURT: Please, Mr. Wilson, let me finish. It is highly prejudicial and not very probative of anything.

You see, this is an unusual case. He has not testified he made a mistake or that he had careless records or that his secretary filled out the records wrong and it was billed by inadvertance or negligence or something like that. This man has flatly testified under oath before me in this trial that every one of these treatments for which he billed had been rendered. Maybe you didn't hear it. (Tr. 865).

Judge Brieant emphasized at least four more times that the probative value of such evidence was overwhelmed by the implication that Appellant's civil settlement was a criminal act. (Tr. 866, 867, 869, 871).

After redirect of Appellant, the entirety of which is set out herein, the judge changed his decision completely.

REDIRECT EXAMINATION

BY MR. GRUNEWALD:

Q Dr. Buthorn, can you tell us the difference between in-patient and out-patient?

A Yes. It's a term that refers to a patient -- to patients who are residing in a facility, such as a nursing home or hospital. That is termed an in-patient.

People who are taken care of almost anywhere else, whether it be in a physician's office or in fact a clinic at the hospital, these are termed out-patients.

An out-patient comes, receives care from a physician and leaves.

Q Now, in connection with in-patient treatment, a hospital facility or something of that nature, are there generally nurses there?

A Yes, there are.

Q In the case of out-patient facilities, and in particular, let's go to the clinic in 1971, the Centro Medico Clinic, did you have any nurses there?

A No, I didn't.

Q Was that in-patient or out-patient type of treatment?

A That is an out-patient kind of treatment.

Q With respect to the keeping of records, are there any directives from Medicaid with respect to how you must keep records and for how long a period of time, or anything of that nature?

A No, there is no obligation at all.

Q Since you were asked the questions with respect to Medicare, is there the same rule or what?

A There are no directives. In fact, if you make a request from Medicare as to receive directives as to what they want, they will simply say that it is illegal for Medicare to give out directives as to the administrative care of individuals.

Q With respect to the card records that you initially kept for a few months in 1971, was there anything on those card records that would be substantially different than what was on the invoices themselves?

A No, there would not be.

Q When in or about 1975 -- you told us you were clearing out your office and some things were thrown out.

Was that the only thing that was thrown out at the time?

A No, there were a great deal of things thrown out of the office.

Q The card records, for what period of time were there, as best you can recall?

A The card records were the beginning of 1971.

Q Did you keep anything which reflected the same information that was on those few card records?

A Yes, I did. I kept the pink sheets of my invoices filed with New York State.

Q At the time that you cleaned out your office, at that time were you indicted or even accused of the charges in this indictment?

A No, I was not. (Tr. 934-6).

Over timely objection of defense counsel (Tr. 937) the prosecutor was allowed to develop the hitherto condemned evidence. The theory of the Court was: (1) that redirect had opened the door (Tr. 937); 2) that the evidence, only moments before a criminal act, was now merely civil in nature (Tr. 942); and (3) an almost incomprehensible statement by the Court that "This particular line of inquiry is being permitted for a very limited purpose only, and that is to assist the jurors in considering the credibility of this witness as to his testimony that he threw out or destroyed cards or records in the HIN Clinic for services rendered in 1971. That is all." (Tr. 945).

The Court abused its discretion by allowing evidence of the civil settlement, which he repeatedly acknowledged was prejudicial and probative of very little (Tr. 865). Rule 403,

F. R. Cr. P. Moreover, the Court acknowledged that the evidence of the settlement was not a "similar act" and was merely rebuttal (Tr. 1051), thus the only effect of the evidence was to inflame the jury by creating the impression that Appellant had a criminal character and predisposition to commit the crimes alleged. This type of conviction by character assassination has been condemned by all courts. Although the type of impeachment differed somewhat, the general principle was stated in Boyd v. U. S., 142 U. S. 450, 458 (1982):

Those robberies may have been committed by the defendants in March, and yet they may be innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue . . .

See also United States v. Davenport, 449 F2d 696 (5th Cir. 1971).

Argument III

THE INDICTMENT SHOULD BE DISMISSED BECAUSE
THE TRANSCRIPT OF TESTIMONY BEFORE THE GRAND
JURY DOES NOT REVEAL ANY INSTRUCTION THAT ITS
MEMBERS COULD SUBPOENA WITNESSES WHO HAD FIRST-
HAND KNOWLEDGE

The transcript of testimony before the Grand Jury does not reveal any instruction that it might subpoena witnesses who had firsthand knowledge of the facts concerning Appellant. After timely motion by defense counsel, Judge Brieant asked the prosecutor:

THE COURT: Can you show me within the terms of the Estepa case that the Grand Jury was told in effect that if they wanted to demand the presence of Camacho and Diaz and Fogg and Galarza [witnesses], and so forth, rather than taking testimony of Miss Rina Morey [agent] that they might do so?

MR. WILSON: Your Honor, I don't think it is in that transcript. I don't recall if I gave them a warning off the record. (Tr. 640).

The prosecutor responded by introducing an affidavit of the prosecutor who handled the Grand Jury that apparently indicted Appellant (Appendix, affidavit of JoAnn Harris). However, that affidavit is vague; it never specifies that the Grand Jury which indicted Appellant was instructed about its right of subpoena.

Assuming the affidavit was sufficient to reveal that proper instructions were given, it is urged nevertheless that the potential for prosecutorial abuse such as that recounted in

Estepa v. United States, 471 F2d 1132, 1137 (2d Cir. 1972) will never be eliminated until the U. S. Attorney and his/her assistants give those instructions on the record so that the transcript reveals exactly what was said.

Appellant may not have been indicted if the Grand Jury had called some of the witnesses who appeared at trial and this Court has no way of ascertaining whether its members wanted to call them or knew that they could. Estepa, supra.

Argument IV

THERE WAS NO FILING OF A FALSE CLAIM
WHICH RELATED TO A MATTER WITHIN THE
JURISDICTION OF A DEPARTMENT OR AGENCY
OF THE UNITED STATES.

The indictment alleges that the Defendant knowingly and wilfully made, or caused to be made, false statements of a material nature in a matter within the jurisdiction of a department or agency of the United States, 18 U.S.C. § 1001 (1970). Assuming arguendo that allegation was correct, the scheme to defraud was complete when payment in full was received from New York City and the Appellant was never informed the payments came from the federal government. Therefore the alleged false statements never became a matter within the jurisdiction of any federal department or agency.

While a violation of § 1001 does not require the actual falsified document to come into the possession of a federal agency United States v. Candella, 487 F.2d 1223 (2d Cir. 1973), cert. denied, 415 977 (1974), it does require the existence of a significant relationship between the federal agency and the party to whom the false statement was submitted.

In the instant case, the interest of the federal agency or department involved is obscured by an administrative structure which refers to New York City alone. The payment forms

are supplied by the City, requests for payment are directed to a City agency and payment in full is received through New York City checks.

No one will deny that the federal government has a right to protect its monetary interests, but at the same time the individual has a right to be apprised of whom he is dealing with in order to weigh the possible consequences of his conduct.

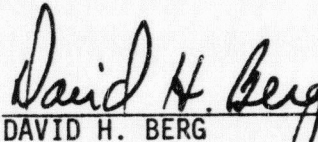
Moreover, New York State has an adequate remedy against the Appellant if the State can prove misconduct. § 175.35 of the New York Penal Law (McKinney 1975) makes it a felony for anyone, knowing an instrument to contain a false statement and with the intent to defraud the state or any political subdivision, to offer or present it to a public office or servant with the knowledge or belief that it will become part of the records of such public office or servant.

If the Appellant has committed a crime, that crime was certainly complete when it reached fruition - when he received payment in full from New York City; he should have been prosecuted in state rather than federal court.

CONCLUSION

For the reasons set forth above, under Arguments I and II Appellant's conviction should be reversed and remanded; under Arguments III and IV, the indictment should be dismissed and the conviction reversed, or in the alternative under Argument III the case should be remanded for further hearing.

RESPECTFULLY SUBMITTED,

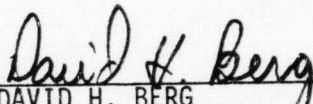


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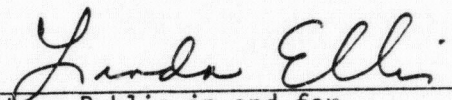
CERTIFICATE OF SERVICE

I, DAVID H. BERG, do hereby certify that on the 8 day of June, 1977, a true and correct copy of Appellant's Brief/Appendix was served by sending the same to Mr. Robert B. Fisk, Jr., United States Attorney For The Southern District Of New York to the attention of Mr. George Wilson, Assistant United States Attorney For The Southern District Of New York at United States Courthouse Annex, 1 St. Andrew's Plaza, New York, New York 10007 by certified U. S. Mail.



DAVID H. BERG
Attorney In Charge for Appellant

Sworn and Subscribed to this 8th day of June, 1977, to certify which witness my hand and seal of office.



Notary Public in and for
Harris County, T E X A S

STATUTES

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false, fictitious or fraudulent statement or entry, shall be fined no more than \$10,000/5 years.

Title 18 U.S.C. § 1001

Whoever wilfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Titla 18 U.S.C. § 2(b)

Buttorn, Mark Frederick, Jr.
JUVENILE + 01
U.S. MAG. CASE NO. 02081

U.S. TITLE/SECTION
18:287 & 2
18:1001 & 2

OFFENSES CHARGED
False claims against U.S. Agency.
False statements against U.S. Agency.

ORIGINAL COUNTS
1-28
29-56

3/24

U.S. MAG. CASE NO. 02081

Disposition of Charges
2-2-77

Sentence
3-4-77

On All Charges
On Lesser Offense(s)
On Government's Motion

II. KEY DATES & INTERVALS

ARREST or
U.S. Custody Began
1-29-76

INDICTMENT X
Information
6-25-76

ARRAIGNMENT
7-2-76

TRIAL
Trial Set For
7-8-76

First Appearance
7-2-76

MAGISTRATE

Search Warrant
Issued
Return

Summons
Issued
Served

Arrest Warrant Issued
COMPLAINT

OFFENSE
(In Complaint)

DATE
INITIAL/NO.

INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION OR REMOVAL HEARING
Date Scheduled
Date Held

WAIVED
NOT WAIVED
INTERVENING INDICTMENT

OUTCOME
DISMISSED
HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.
George E. Wilson
791-1952

ATTORNEYS
Defense
CJA
Ret.
Waived
Self
None
Other
Raymond B. Grunewald
233 Broadway
New York, NY

* Show last names and suffix numbers of other defendants on same indictment information

DATE	(DOCUMENT NO.)	PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
6-25-76		Filed indictment. Case assigned to Judge Frankel superseding 76 Cr 112.	
7-1-76		Pleading adj to 7-2-76.....Knapp,J.	
7-2-76		Deft (atty present) Pleads N/G R.O.R. Case referred to Frankel,J. as a related & superseding indictment...Knapp,J.	
7-6-76		Filed notice of appearance of Raymond B. Grunewald as atty for deft	
7-8-76		Jury Trial commenced, (George E. Wilson, AUSA, Atty Raymond B. Grunewald) pres. COUNTS 1 thru 26 withdrawn by Government.	
7-9-76		Trial Cont'd.	
7-12-76		Trial cont'd.	
7-13-76		Trial Cont'd.	
7-14-76		Trial Cont'd. Jury retires from deliberations at 6:30 PM.	
7-15-76		Trial Cont'd. Jury resumes deliberations at 9:40 AM. Just returned a verdict of "NOT GUILTY", as to COUNT FIVE (5). Jury retires from deliberations until 9:30 July 16, 1976.	

(Cont'd on Page 22)

BEST COPY AVAILABLE

DATE	IV. PROCEEDINGS (continued)	PAGE TWO	V. EXCLUDABLE DELAY			
	(DOCUMENT NO.)		Interval (a)	Start Date (b)	LT Code (c)	Total Days (d)
7-15-76	Trial Cont'd. Jury resumes deliberations. Jury returns a verdict of GUILTY as to COUNT 21 and NOT GUILTY as to COUNT 22.					
7-17-76	Trial Cont'd. Jury resumes deliberations. Verdict of GUILTY as to COUNT 21 set aside by the Court upon notification that Jury withdraws that decision. Mistrial declared when Jury reports they are unable to reach a verdict. Deft. R.O.R....FRANKEL, J.					
8-31-76	✓ Filed transcript of record of proceedings, dated July 8, 9, 12, 13, 14, 1976					
9-14-76	Filed letter from Michael J. Gillen to Judge Brieant.					
11-19-76	✓ Filed transcript of record of proceedings, dated 7-14-76					
12-2-76	Fid Deft's Motion for an order granting all motions previously directed by the deft to the court prior to the case's reassignment to present Court....ret time to set by Court.					
1-24-77	(Cts. 29 thru 56 are re-numbered as cts. 1 thru 28) Deft (atty pres) trial by Jury begun.					
1-25-77	Trial cont'd					
1-26-77	" "					
1-27-77	" "					
1-28-77	" "					
1-31-77	" "					
2-1-77	" " Deft's motion for Judgment of acquittal is granted as to cts. 7, 11, 15 & 21.					
2-2-77	Trial cont'd Jury verdict deft GUILTY on cts. 1, 2, 3, 4, 6, 8, 9, 10, 12, 13, 14, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27 & 28. P.S.I. ordered. Sentence adj'd to 3/16/77 R.O.R. So ordered Brieant, J.					
2-4-77	✓ Filed Questions for prospective jurors.					
2-4-77	Filed Govt's Affidavit regarding the empaneling and orientation of grand juries, etc.					
1-31-77	✓ Filed transcripts of record of proceedings, dated 12-28-76.					
2-9-77	✓ Filed Govt's REQUEST TO CHARGE.					
3-16-77	✓ Filed JUDGMENT AND PROBATION/COMMITMENT ORDER - The deft is hereby committed to the custody of the Atty Gen for impr for a period of FOUR (4) YEARS on each of counts, 1, 2, 3, 4, 6, 8, 9, 10, 12, 14, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, & 28, to run concurrently with each other. Pursuant to Sec 4205 (b)(2) of Title 18, U.S. Code deft shall become eligible for parole at such time as the Parole Commission may determine. Deft is continued on his own recognizance pending appeal/ So ordered BRIEANT, J. All copies issued.					
3-24-77	✓ Filed NOTICE OF APPEAL - by the deft from Judgment filed 3-16-77 to the USCA. Mailed Notices to US Atty and Counsel for appellant.					

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

By RAYMOND P. BURCHARDT, Clerk

By [Signature], Deputy Clerk

62-1116
1-1016

dictated
revised
at 9⁵⁰ AM
on 7/8/76
read in
this case -
2/2/77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

MARK FREDERICK LUTHORN, JR.

Defendant.

:

:

:

:

INDICTMENT

S 76 Cr. 600

-X

COUNTS ONE THROUGH TWENTY-EIGHT

The Grand Jury charges:

1. On July 30, 1965, Title XIX of the Social Security Act (the "Medicaid Act") was enacted creating the Medicaid program.

2. Pursuant to the Medicaid Act, the United States Department of Health, Education and Welfare shares with each state the cost of medical services to families with dependent children and to aged, blind, or permanently and totally disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services.

3. The Medicaid program further provides for rehabilitative and other services to help such families and individuals attain or retain capability for independence and self-care.

4. Pursuant to the Medicaid Act each state must promulgate a plan for Medicaid assistance.

5. On May 1, 1966 the State of New York enacted a statewide medical plan in accordance with the provisions of the Medicaid Act.

6. The New York State Social Welfare Law vests responsibility for the medical assistance program within New York State in the State Department of Social Service.

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7. The Department of Social Services of the City of New York, located at 330 West 34th Street in Manhattan, processes and pays claims by various providers for Medicaid services rendered within New York City. The nature and amount of all such claims is reported monthly by New York City to the New York State Department of Social Services.

8. The New York State Department of Social Services submits quarterly to the Department of Health, Education and Welfare a report detailing the nature and amount of such claims.

9. The Department of Health, Education and Welfare reimburses federally qualified claims at the rate of fifty cents on each dollar paid by the State of New York.

10. At all times material herein MARK FREDERICK BUTHORN, JR., the defendant, was licensed by the State of New York as a podiatrist and was certified by the City of New York as a medicaid provider. Defendant practiced among other places, at H.I.N. a/k/a Centro Medico a/k/a St. Mary's, a/k/a St. Ann's at 567 East 149th Street, Bronx, New York. The business of said clinic was to provide Health-care services to Medicaid-eligible patients.

11. On or about the dates set forth in paragraph 12 of this Indictment MARK FREDERICK BUTHORN, JR., the defendant, engaged in a scheme and artifice to defraud the City of New York, the State of New York and the United States, whereby he would obtain money by false, fictitious and fraudulent pretenses and representations. Defendant prepared and caused to be prepared and submitted and caused to be submitted certain invoices for payment for claimed medical services rendered to Medicaid patients. In truth and in fact some or all of the claimed services were not performed by the defendant and some or all of the patients were not seen by defendant on the dates claimed. These invoices, and others, were submitted to the City of New York for payment and subsequently

formed the basis for claims by the State of New York against the United States Department of Health, Education and Welfare for reimbursement pursuant to the Medicaid Act.

12. On or about the date set forth below in the Southern District of New York, in a matter within the jurisdiction of a department and agency of the United States, to wit: the United States Department of Health, Education and Welfare, MARK FREDERICK BUTHORN, JR., the defendant, unlawfully, wilfully and knowingly did falsify, conceal and cover up, and cause to be falsified, concealed and covered up, by trick, scheme and device, material facts, and did make and cause to be made false fictitious and fraudulent statements and representations and did make and cause to be made and did use and cause to be used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries, in that the defendant, MARK FREDERICK, JR., submitted and caused to be submitted to the United States Department of Health, Education and Welfare various false and fraudulent statements which were based in part upon "Invoices for Doctor's Services" in which defendant certified and caused to be certified that medical services were furnished by him to the medicaid patients listed therein, when, in truth and in fact, as the defendant then and there well knew, said certifications were false in that some or all of the claimed medical services were not rendered and some or all of the patients were not seen by him.

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INVOICE NUMBER	FAMILY NAME	DATE OF CERTIFICATION
1	CANACHO	April 1, 1971
2	CANACHO	May 23, 1972
3	ELIAS	May 23, 1972
4	FOGG	September 23, 1971
NG 5 7/15	FOGG	September 23, 1971
6	FOGG	September 30, 1971
7	GALARZA	May 5, 1971
8	GALARZA	July 15, 1971
9	GALARZA	July 22, 1971
10	GALARZA	July 29, 1971
11	GALARZA	November 30, 1971
12	ORTIZ	May 19, 1971
13	ORTIZ	May 20, 1971
14	ORTIZ	May 26, 1971
15	QUINONES	May 4, 1971
16	QUINONES	May 27, 1971
17	QUINONES	May 27, 1971
18	QUINONES	June 3, 1971
19	QUINONES	July 7, 1971
20	QUINONES	September 15, 1971
G - 21 7/16	SMITH	September 9, 1971
X - 22 7/16	SMITH	September 9, 1971
23	VASQUEZ (MERCEDES)	October 19, 1971
24	VASQUEZ (MERCEDES)	November 18, 1971
25	VASQUEZ (MERCEDES)	December 21, 1971
26	VASQUEZ (MERCEDES)	May 2, 1972
27	VASQUEZ (MIRANDA)	September 15, 1971
28	VASQUEZ	September 15, 1971

(Title 18, United States Code, Sections 1001 and 2)

FORNMAN

ROBERT B. FISKE, JR.
United States Attorney

United States of America vs.

United States District Court for

Mark Frederick Buthorn

Southern District of New York

DEFENDANT

DOCKET NO.

876 Cr. 600 CLB

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH DAY YEAR
3 16 '77

COUNSEL

☐ WITHOUT COUNSEL

However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

Raymond B. Grunewald

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,

☐ NOLO CONTENDERE,

☒ NOT GUILTY

FINDING &
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged
☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of **false statements to a U.S. Agency.**
(Title 18, U.S. Code, §§1001 and 2.)

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

**FOUR (4) YEARS on each of counts 1,2,3,4,6,8,9,10,12,14,16,17,18,19,
20,23,24,25,26,27 and 28, to run concurrently with each other.**

**Pursuant to §4205(b)(2) of Title 18, U.S. Code, defendant shall become
eligible for parole at such time as the Parole Commission may
determine.**

Defendant is continued on his own recognizance pending appeal.

SPECIAL
CONDITIONS
OF
PROBATION

Entered on Docket 3-21-77

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

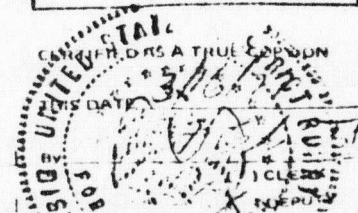
It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☐ U.S. District Judge

☐ U.S. Magistrate

Charles L. Bryant 3-16-77



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES

v.

MARK FREDERICK BUTHORN

-----X United States District Court
for the Southern District of
New York

Case No. 76 Cr 600(S)

Judge Brieant

-----X

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA :

-v- : AFFIDAVIT

MARK FREDERICK BUTHORN, JR., : S 76 Cr. 600 (CLB)

Defendant. :

-----X

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOANN HARRIS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and as such was in charge of the empaneling and orientation of grand juries in this District from approximately August 1975 through August 1976.
2. Part of my duties was to conduct an organizational meeting with newly empaneled grand juries before they heard any cases.
3. My unvarying practice was to conduct these meetings from a rough checklist, which included, among other things, an item entitled "hearsay warning".
4. I would always tell the assembled grand jurors about hearsay testimony twice during this meeting.
5. The first occasion was when I described the kinds of cases and witnesses they would be hearing and I would say, in substance:

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"You will hear two kinds of testimony. We call them 'direct' and 'hearsay'. 'Direct' testimony is when a witness comes in and tells you what he or she saw, touched, smelled, heard from a target directly. 'Hearsay' testimony is when a witness comes in and tells you what someone else said to them. They will have no direct knowledge of the events about which they testify. Now, hearsay is perfectly admissible before grand juries, but you should know that if at any time you feel you need to hear the testimony from the horse's mouth, that is, from the person who has the direct knowledge -- you should know that you have a right to ask for it and to get it." I would follow this by examples demonstrating situations where they probably wouldn't need direct testimony, i.e., an agent testifying about what a fellow agent said -- and where they might very well want direct testimony, i.e., a basically unreliable witness testifying about what a basically unreliable person had said.

6. The second occasion was at the end of the session when I told them that there were two important things that I wanted to ^{repeat} ~~request~~. One was the warning that they could not use the proper invocation of the fifth amendment against any witness; the second was a reminder that whenever they were presented with hearsay evidence, they had a right to demand direct evidence when they felt they needed it.

7. I conducted the organizational meeting with
the 1976 June Regular Grand Jury on June 8, 1976.

JOANN HARRIS
Assistant United States Attorney

Sworn to before me this
day of January, 1977